Supreme Court, U.S.
FILED
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No. ____

In the Supreme Court of the United States

ANDREW MESSINA, JR.
AND D&G PRODUCTIONS, INC.
Petitioners,

v.

THE PARISH OF ST. CHARLES,
THE ST. CHARLES PARISH COUNCIL,
GREG CHAMPAGNE, IN HIS CAPACITY AS THE
SHERIFF & EX-OFFICIO TAX COLLECTOR
FOR THE PARISH OF ST. CHARLES,
AND DEPUTY PAM SCHMITT
Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana to Review the Decision of the Louisiana Fifth Circuit Court of Appeal Affirming the Grant of Summary Judgment by the 29th Judicial District Court Parish of St. Charles

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Louisiana appellate court err by failing to render a full opinion that addressed the dispositive issues in this case?

2. Did the Louisiana appellate court err by not finding a genuine issue of material fact as to whether the actions of Respondents constituted a violation of the Petitioners' rights to freedom of expression?

3. Did the Louisiana appellate court err by not finding a genuine issue of material fact as to whether the actions of Respondents constituted a taking and a violation of the Petitioners' substantive due process rights?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. D&G Productions, Inc. is a Louisiana corporation which is not publicly held. No publicly held company owns ten percent or more of D&G Productions, Inc.

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OPINIONS BELOW

The March 26, 2004 opinion of the Supreme Court for the State of Louisiana denying Certiorari. Appendix 22a. The December 30, 2003 opinion of the Fifth Circuit Court of Appeal for the State of Louisiana. Appendix 8a. The Reasons for Judgment issued by the 29th Judicial Court for the Parish of St. Charles. Appendix 1a.

STATEMENT OF JURISDICTION

The Supreme Court for the State of Louisiana issued its opinion on March 26, 2004. This petition for certiorari is timely in that Petitioners have filed it within 90 days of March 26, 2004. The Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the First, Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

I. Overview of the Case

On February 10, 2003, the 29th Judicial District Court for the Parish of St. Charles granted the Parish's Motion for Summary Judgment. On March 19, 2003, the 29th Judicial District Court for the Parish of St. Charles issued Reasons for Judgment. Appendix 1a. On December 30, 2003, the Louisiana Fifth Circuit Court of Appeal affirmed. Appendix 8a. On March 26, 2004 the Supreme Court of the State of Louisiana denied application for writ of certiorari and/or review. Appendix 22a.

II. Background of the Case

The Petitioners are Andrew Messina, Jr. and a company of which he is the president and sole shareholder, D&G Productions, Inc. ("D&G"). In 1994, D&G leased a tract of land located in St. Charles Parish, from which D&G operated Messina's Oaks Plantation. Messina's Oaks Plantation was a reception hall for weddings and other gatherings.

In each year from 1994 through 1997, the D&G applied for and obtained a class A "restaurant" alcohol permit for the operations of Messina's Oak Plantation. These permits were in effect from January 1 to December 31 of each respective year.

At all times relevant to these proceedings, it was illegal for businesses to allow their patrons to consume alcoholic beverages in the outdoor area of the business' premises. However, in each year that D&G obtained its "restaurant" alcohol permit until August 5, 1997, restaurants in St. Charles Parish were automatically exempt from this prohibition.

As part of its facilities, Messina's Oaks Plantation employed a large tent for its outdoor receptions. Through December 31, 1997, D&G entered into several contracts with brides to hold receptions at Messina's Oak Plantation. In these contracts, D&G agreed to accommodate large numbers of guests. The large number of guests prevented the receptions from being held entirely inside of the premises. By virtue of the contracts with the brides, D&G had to allow its patrons to consume alcohol in the outdoor areas of the premises. Prior to August 5, 1997, D&G could do this by the rights bestowed by its "restaurant" alcohol permit.

At some time during 1997, neighborhood residents complained to officials of the Respondents, St. Charles Parish, about the noise emanating from Messina's Oaks Plantation. In response, on August 5, 1997, while D&G's permit was still in effect, the Defendants-Respondent passed ordinance No. 97-81 ("Ordinance"), which required restaurants to apply for and receive an additional permit before the restaurants could allow their patrons to consume alcohol in outdoor areas of the premises. This Ordinance went into effect immediately.

At the August 5, 1997-council meeting, the Parish attorney introduced the Ordinance. He stated that there was a noise problem with Messina's Oak Plantation that the council should address. He also stated that ordinances regulating noise would be difficult to be found constitutional and to enforce. In order to "get around" these problems, he recommended the passage of the Ordinance to force Messina's Oak Plantation to discontinue creating noise. Several council members and a few others spoke at the meeting. The only thing mentioned, whatsoever, as a grounds to enact the Ordinance was to deal with the noise.

After the passage of the Ordinance, but again prior to the expiration of D&G's "restaurant" alcohol permit, the Ordinance was enforced and caused D&G to breach many of the contracts with the brides. The Petitioners applied for the permit created by the Ordinance, which was, of course, denied. The actions of the Respondents caused D&G to breach numerous contracts, have numerous lawsuits filed against them seeking damages for those breaches and further caused D&G to lose hundreds of thousands of dollars in gross revenues. With such catastrophic losses caused by the Respondents' arbitrary and unconstitutional actions, Messina's was unable to continue as an on-going business concern.

The Petitioners filed suit alleging numerous violations of the Constitution. The trial court granted summary judgment in favor of the Respondents and an appeal followed.

Despite voluminous argument that the Respondents used the Ordinance as an unconstitutional pretext to illegally regulate noise, the Fifth Circuit affirmed the grant of summary judgment without discussing this argument whatsoever in its opinion. The Louisiana Supreme Court denied Petitioners' writ of certiorari. The Petitioners are seeking a review of the Louisiana appellate court's affirmation.

III. Proceedings Below

The Louisiana Fifth Circuit affirmed the trial judge's granting of Respondent's Motion for Summary Judgment. Both the Louisiana Fifth Circuit's affirmation and the trial judge's ruling directly conflict with this Honorable Court's decision in Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). In Newport, the First Circuit held and this Court affirmed that municipalities were prohibited from using mere "pretexts" to abridge individual freedoms of expression. The Louisiana Fifth Circuit affirmed a parishes' use of an alcohol regulation as a pretext to curtail noise. Petitioners have argued and maintain that such a pretext is a direct violation of they important Newport holding.

REASONS FOR GRANTING THE PETITION

Several factors are present that warrant the jurisdiction of this Court. First, the Louisiana Fifth Circuit did not even bother to address Petitioners' pretext argument in its opinion. The secretive manner in which the Louisiana appellate court rendered its decision is in direct violation of

the performance standards set forth by the Louisiana State Supreme Court, as well as sound appellate practices. This is a compelling reason to grant the writ.

Second, the ignored pretext argument deals with constitutional issues and the Louisiana Fifth Circuit's incorrect holding must stem from the lower court's mis-application of the United States and Louisiana Constitutions. This mis-application will cause a material injustice to the Petitioners as their entire business and livelihood has been destroyed.

Moreover, there is great pubic interest in the pretext issue. The Louisiana Fifth Circuit's ruling permits the Respondents to "work around" the strict standards that the United States Supreme Court requires for the regulation of noise. This incorrect application of the Constitution disturbs the balance of power that is critical to our system of government. The public has a great interest in our system of government. A writ should be granted to address this important issue.

Third, the Louisiana Fifth Circuit mis-applied the Constitution when it spoke on the takings and substantive due process claims. The lower court did not recognize that the Respondents simply took away the rights that they had previously sold to the Petitioners. This miscarriage of justice is material.

Additionally, the public, particularly business owners, have a compelling interest in the outcome of this

case. If governmental entities are allowed to take away the rights bestowed by licenses arbitrarily, then the licenses mean nothing. Every business owner who has a license from any governmental entity has an interest in this case. This is substantial issue that should be addressed by this Court.

Accordingly, this Court should grant the requested writ.

I. Review Is Warranted Because the Appellate Court Erred by Failing to Render a Full Opinion That Addressed the Dispositive Issues in this Case.

Exercising this Court's jurisdiction is appropriate because the Louisiana Fifth Circuit grossly departed from proper judicial proceedings by failing to address the dispositive issues in this case. See La. St. S.Ct. R. 10§1(a)(5).

The Louisiana Supreme Court commands the following to its appellate courts:

> Performance Standard 2.2--Clarity of Decisions
>
> Louisiana court of appeal decisions should be clear and **full opinions should address the dispositive issues**, state the

> holding, and **articulate the reasons** for the decision in each case.

La. St. S.Ct. Gen. Admin. R. Part G§10. (Emphasis supplied).

Whether the actions of the Respondents were merely a pretext to violate the Petitioners' right to freedom of expression is a dispositive issue in this case. The Petitioners' original appellate brief assigned seven errors to the trial court, several of which related to the pretext issue. The bulk of the Petitioners' argument in their original brief, reply brief, and oral argument was directed to the pretext issue.

Despite the emphasis on this issue, the Louisiana Fifth Circuit completely skipped any discussion whatsoever on the pretext argument. The appellate court did not address this dispositive issue and it did not articulate reasons for its decision to apparently disagree with the pretext argument and the Newport case discussed at length below. The Louisiana Fifth Circuit's violation of Performance Standard 2.2 is a direct departure from the proper judicial proceedings as set forth by the Louisiana Supreme Court, as well as accepted appellate practices.

II. Review Is Warranted Because the Appellate Court Erred by Not Finding a Genuine Issue of Material Fact as to Whether the Actions of Respondents Constituted a Violation of the Petitioners' Rights to Freedom of Expression.

The appellate court's muteness on its disagreement with the pretext argument may be explained by the argument's correctness. Summary judgment should not be granted when a genuine issue of fact exists. La. Code Civ. Proc. Art. 966(1). An issue of fact exists as to whether the Respondents enacted the Ordinance as a pretext to illegally regulate noise.

This Honorable Court has decreed that any regulation of noise is subject to strict scrutiny. Saia v. New York, 334 U.S. 558 (1948); Polaris Amphitheater Concerts, Inc. v. City of Westerville, 267 F.3d 503 (6th Cir. 2001). Ordinances regulating noise generally require specific measurements of sound, measured from a specific locations, at specific times. Not regulating noise using this method, or another method that is narrowly tailored to the interest of preventing noise, is a violation of the First Amendment and is impermissible. It is unlawful for governmental entities to do something that is impermissible, under the pretext of doing something that is permissible. Newport v. Fact Concerts, Inc., 626 F.2d 1060 (1st Cir. 1980), *rev'd on other grounds*, 453 U.S. 247 (1981).

The record is replete with evidence showing that the Respondents used alcohol regulation as a pretext to regulate noise. When the Parish attorney introduced the Ordinance at the council meeting, he flatly admitted that this ordinance was to "get around" the Supreme Court's requirements for noise regulations. All of the commentary from everyone who spoke at this meeting addressed noise and no other concerns were ever mentioned. In fact, there is no evidence showing that Ordinance was created for anything else besides noise. Thus, summary judgment for the Defendant-Respondents was wrong.

This error is a compelling reason for this Court to exercise its jurisdiction. First, the ultimate holding, although it is not supported by any language in the opinion, is in conflict with a decision of this Honorable Court. Second, the holding stems from an erroneous interpretation or application of the constitution of the United States. Saia, *infra*.

Furthermore, the decision will cause material injustice and significantly affect the public interest. La. St. S.Ct. R. 10§1(a)(4). The decision will cause material injustice because it approves the Respondents' wrongful actions that completely destroyed the Petitioners reputation and livelihood. Leaving the Petitioners with no remedy is materially unjust.

The public interest is significantly affected because the holding tells municipalities that it is okay to "work around" the law as set forth by the judiciary. Sanctioning

this behavior compromises the separation of powers that is the cornerstone of our system of government. This case is worthy of this Honorable Court's consideration.

III. Review Is Warranted Because the Appellate Court Erred by Not Finding a Genuine Issue of Material Fact as to Whether the Actions of Respondents Constituted a Taking and a Violation of the Petitioners' Substantive Due Process Rights.

Although it was discussed, the Louisiana Fifth Circuit's erroneous decision on the substantive due process claim is also in conflict with prior decisions of the Louisiana Supreme Court and it is an erroneous application of the constitution of the United States. La. St. S.Ct. R. 10§1(a)(1) and (4).

Petitioners agree that there is no fundamental right to sell alcohol or to allow the patrons of your business consume alcohol in the outdoor areas of your premises. However, once a municipality sells these rights by issuing a permit, the rights granted under the permit become property rights, which are fundamental. See Paillott v. Wooton, 559 So.2d 758 (La. 1990); Reynolds v. Louisiana Board of Alcoholic Beverage Control, 248 La. 639, 181 So.2d 377 (La. 1965); and Nomey v. State of Louisiana, 315 So.2d 709 (La. 1975). A municipality cannot arbitrarily take away any fundamental rights, including those granted

by a permit. Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981).

The evidence in the case shows that this is exactly what the Respondents did to the Petitioners. Evidence supports the following facts:

1. That D&G paid for a valid class A "restaurant" alcohol permit that was in effect from January 1, 1997 to December 31, 1997;

2. That this permit gave D&G the right to sell alcoholic beverages;

3. That, prior to the enactment of the ordinance at issue herein, only "restaurants" could permit there patrons to consume alcoholic beverages in the outdoor areas of the premises;

4. That, prior to the enactment of the ordinance, the "restaurant" permit, gave D&G the right to allow its patrons to consume alcoholic beverages in the outdoor areas of its premises;

5. That, before the expiration of the permit on December 31, 1997, the ordinance took away D&G's right to allow its patrons to consume alcoholic beverages in the outdoor areas of its premises;

6. That being unable to allow its patrons to consume alcoholic beverages in the outdoor areas of the premises caused D&G to breach numerous contracts; and

7. That because of having to breach these numerous contracts, D&G had to cease operations and caused the Petitioners to incur the other damages at issue herein.

The above facts demonstrate that D&G acquired a valid property right to allow its patrons to consume alcohol in the outdoor areas of its premises until December 31, 1997 and that the Ordinance arbitrarily took away this right. The Respondents actions were an unconstitutional taking and a violation of the Plaintiff-Applicants' substantive due process rights. Summary judgment was not appropriate on these claims.

The Louisiana Fifth Circuit's decision conflicts with the decisions of this and other courts, which in and of itself provides a reason to grant the writ. More importantly, the lower court's mis-application of the United States Constitution creates a material injustice and significantly affects the public interest.

First, it is materially unjust to destroy the Petitioners' business when they did nothing illegal. The Petitioners opened a business in conformity with the laws that existed. They got every license that the Petitioners needed to operate their business. The Petitioners invested

money into the business with the expectation that the licenses that they acquired would allow them to conduct business as long as the licenses were in effect. Suddenly and arbitrarily, the Respondents changed the rules and made it impossible for the Petitioners to do business. It shocks the conscience to think that this could happen. A material injustice has occurred.

Second, the mis-application of the Constitution significantly affects the public interest. It is in the public's interest that businesses know that they can rely upon the permits and licenses that governments sell. The Respondents "working around" our Constitution materially affects all businesses. The Louisiana Fifth Circuit's decision condoning such behavior erodes the public's faith in the government. The public's interest in the outcome of this case is high. This case is worthy of the Court's consideration.

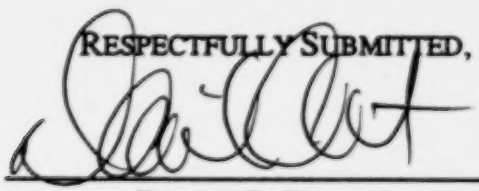
CONCLUSION

The Louisiana Fifth Circuit's silence on a central issue in this case in and of itself should be grounds to grant the requested writ. The lower court failed at its most basic job, that of writing opinions. The muteness on the pretext issue is poignant because it seems as though the appellate court did exactly what the Respondents did: they attempted to hide their incorrect actions. This is a very compelling reason for this Court to grant the writ.

The pretext issue and the takings and substantive due process issues are of great importance to the public. They deal with the government's relationship with itself and with individuals. This Court in the Newport case has already sent the message that municipalities should not employ pretexts to violate our Constitution. This Honorable Court's intercession is once again needed. These issues are worthy of this Honorable Court's consideration.

For these reasons, the Petitioners respectfully request that this Honorable Court GRANT the writ of *certiorari*.

RESPECTFULLY SUBMITTED,



DAVID C. CLEMENT

June 23, 2004

TWENTY-NINTH JUDICIAL DISTRICT COURT

IN THE PARISH OF ST. CHARLES

STATE OF LOUISIANA

ANDREW G. MESSINA, JR., ET AL.
VERSUS
THE PARISH OF ST. CHARLES, ET AL.

NO. 50,029
DIVISION
"D"

THE HONORABLE KIRK R. GRANIER
JUDGE

Transcript of the Proceedings
Taken in Open Court at Hahnville, Louisiana on
March 19, 20003

REASONS FOR JUDGMENT

REPRESENTING THE PLAINTIFF:

REPRESENTING THE DEFENDANT:

PREPARED BY: NANCY FREMEN, CCR
Official Court Reporter

REASONS FOR GRANT OF SUMMARY JUDGMENT IN FAVOR OF ST. CHARLES PARISH

FACTUAL BACKGROUND

Plaintiff, D. & G Productions, Inc., filed this lawsuit against the defendant, St. Charles Parish, requesting damages for the denial of a permit to serve alcohol beverages outdoors near its leased restaurant and wedding reception hall facilities. Plaintiff claims violation of his constitutional rights under Equal Protection, Due Process and taking provisions of the united States and Louisiana Constitutions.

In April, 1994 plaintiff D & G Productions, Inc. whose sole share holder was the plaintiff, Andrew Messina Jr., leased a building in Destrehan, Louisiana located at 20 Avenue of the Oaks for the purpose of operating a restaurant and wedding reception hall (Messina's Oak Plantation). In the following three years plaintiff's business increases to the point that D&G Productions, Inc. booked wedding receptions almost every weekend. The wedding reception building is approximately three thousand to four thousand square feet. The maximum indoor facility capacity was seventy-five people. Attendance surpassed this seventy-five person capacity limit and plaintiff according extended its hosting services to an outdoor tent. Plaintiff served alcoholic beverages both inside the reception hall and outside both in and around the tent facility. The outdoor facility was larger and sometimes drew crows approaching 250 people.

In 1997 plaintiff began receiving complaints from nearby neighbors regarding the noise from his outdoor wedding receptions. Plaintiff unsuccessfully attempted to resolve these complaints. Around this time the St. Charles Parish council was considering regulation of outdoor alcoholic beverage service by restaurants located near residential neighborhoods. As a result, the St. Charles Parish Council passed ordinance No. 97-8-1 on August 5, 1997 which amended section 3-6 by eliminating existing exemptions for restaurants from regulations governing permitted outdoor areas where alcoholic beverages could be consumed. Specifically, ordinance No. 97-8-1 provided that negative impacts to adjoining residential areas at local restaurants prompted a need to revise the specific restaurant exemption from the ordinance. The amendment required the proprietor of an outdoor area surrounding a barroom or restaurant where alcoholic beverages were served and consume to file an application for that specific type of use with the director of the planning and zoning department for St. Charles Parish. The Planning and Zoning Department would then post the applicants property with the notice of the permit request for the required five day period. The director would then approve the application if he received no negative commentary on the permit application from any property owner within five hundred feet of the applicant's property. If, however, the director received any negative commentary from eligible property owners the permit application was then forwarded to the council secretary for consideration by the St. Charles Parish Council. In addition, if the planning and zoning director disapproved the application even though he received no negative comment,

the applicant would then be able to appeal the negative decision to the St. Charles Parish Council.

Plaintiff in this case submitted his application for an outdoor permit, pursuant to this ordinance, on December 9, 1997. The Department of Planning and Zoning posted the proper notice and afterwards received four objections to the issuance of permits by four property owners within the designated distance from plaintiffs business. As result, the St. Charles Parish Council tabled plaintiffs permit application on January 5, 1998. On February 2, 1998 it denied the permit application submitted by plaintiff.

LAW AND REASONS FOR JUDGMENT

The Court shall render a summary judgment when there is no genuine issue of material fact and mover is entitled to judgment as a matter of law. This now favored procedure is designed to secure the just, speeding and inexpensive determination of actions. The Court should grant a motion for summary judgment against the adverse party who fails to make a showing sufficient to establish the existence of proof of an element essential to its claims on which he bares the burden of proof at trial.

Ordinance No. 97-8-1 was a legislative action enacted by the St. Charles Parish Council. Ordinarily these actions do not lend themselves to procedural due process claims. In *South Gwent v. Prat*, 491 F.2d 5, The United States Fifth Circuit Court of Appeal held that zoning ordinances enacted by a city council were characterized as

legislative or quasi-legislative, thereby negating procedural due process claims. Accordingly, a property owner must show a vested right established by law, a denial of that right without adequate notice and hearing before a procedural due process violation and claim can be assertive. Here, the plaintiff does not have a vested right to sell alcoholic beverages. The state, pursuant to its police power, may regulate and control the sale of alcoholic beverages in order to control the negative effects and consequences of its consumption. See *Acy v. Allen Parish Police Jury*, 520 So.2d 866 (La. App. 3rd Cir. 1987).

Regarding plaintiffs substantive due process claim. In the exercise of its police powers and zoning decision, the state must have a rational basis for regulating private behavior on private property. See *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986). There is no genuine issue of fact in the case at bar that the ordinance at issue was rationally related to a legitimate government interest, i.e. the regulation of alcoholic beverage consumption outdoors near residential neighborhoods. Plaintiff's deposition established that he received repeated complaints of noise from patrons at his outdoor reception tent. The noise, undoubtedly, increased wit the increase of alcohol consumption by patrons. St. Charles Parish Council had a legitimate interest in preserving the integrity of the residential neighborhood adjacent to plaintiffs business and, with good reason, passed an ordinance that limited the outdoor sale and consumption of alcohol in the parish. There is no genuine issue of fact that this zoning ordinance bares a substantial relationship to the public health, safety and general welfare of the

residential neighborhood here and was in furtherance of a legitimate governmental interest. Even assuming the ordinance was past directly as a result of the noise problems at plaintiffs business location, the ordinance past by the St. Charles Parish Council was constitutionally acceptable. In *Cannon v. Richland Parish Police Jury*, 388 So.2d 1188 (La. App. 2d Cir. 1976), the court held that the parish police jury had expressed statutory authority and sound discretion to amend a prior ordinance to prohibit the sale of beer within three hundred feet of a church even though the amendment occurred shortly after the plaintiff filed its application for a alcohol permit.

Regarding plaintiffs Equal Protection claim. The plaintiff is not a member of a suspect class and therefore the equal protection clause requires only a minimum degree of rationality. The St. Charles Parish Councils ordinance and its denial of plaintiff's permit application requires only a arguably rational relationship to a conceivably legitimate governmental goal. There is no genuine issue of fact here. This ordinance is rationally related to the legitimate governmental objective of controlling and curtailing alcohol consumption based noise near residential areas.

Finally, regarding plaintiff's taking claim. This ordinance did not sufficiently intrude upon plaintiffs economically viable use of the its leased property to constitute a taking of property requiring compensation . The fifth amendment prohibition against the taking of property without compensation does not guarantee the most profitable use of that property, see *Jackson Court*

Condominiums, Inc. v. City of New Orleans 874 So.2d 1070 (5th Cir. 1989). Clearly, the plaintiff's business did not close as a result of this ordinance. Plaintiff was still allowed to sell alcoholic beverages inside his facility and to continue the outdoor receptions as long as alcohol was not consumed or sold outside the facility.

For these reasons the motion for summary judgment filed by the defendant, St. Charles Parish is granted. Plaintiffs lawsuit is dismissed with prejudice.

* * * * * * * * *

C-E-R-T-I-F-I-C-A-T-E

I, Nancy Freman, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings taken on March 19, 2003, held in the matter of **ANDREW G. MESSINA, JR., ET AL VERSUS THE PARISH OF ST. CHARLES, ET AL., NUMBER: 50,029**; to the best of my ability and understanding.

s/Nancy Freman
Nancy Freman, CCR
Official Court Reporter
In and for the 29th Judicial District

ANDREW MESSINA, JR.	NO. 03-CA-644
VERSUS	FIFTH CIRCUIT
ST. CHARLES PARISH COUNCIL	COURT OF APPEAL
	STATE OF LOUISIANA

ON APPEAL FROM THE 29TH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 50,029, DIVISION "D"
HONORABLE KIRK R. GRANIER, JUDGE PRESIDING

DECEMBER 30, 2003
JAMES L. CANNELLA
JUDGE

Panel composed of Judges Sol Gothard,
James L. Cannella and Clarence E. McManus

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AFFIRMED

This is an appeal by the Plaintiffs, Andrew Messina, Jr. (Messina) and D&G Productions, Inc. (D&G), from a summary judgment denying an outdoor liquor permit by the Defendant, the Parish of St. Charles (the Parish). We affirm.

In April of 1994, D&G, through its President and owner, Messina, leased a building at 20 Avenue of the Oaks, Destrehan, Louisiana for the purpose of operating a wedding reception hall and restaurant. The building is 3,000-4,000 square feet, with a maximum capacity of 75 people and is located within 500 feet of a residential neighborhood. The Plaintiffs operated the business in the name of Messina's Oak Plantation (Messina's) for three years. The reception business steadily grew and the booking increased to multiple events on the weekends and large parties. To accommodate the larger parties, the Plaintiffs erected a large tent outside the building to accommodate up to 250 people. Liquor was served outdoors and musicians played in an outside tent. In 1996, Huey Long (Long), a neighbor, complained of noise from a diesel operated truck which was hired to provide air-conditioning to the outside tends. The Plaintiffs subsequently purchased air-condition units to replace th truck. However, as the events and the number of guests increased, the noise from outside music increased. Long and other residents of the area nearby complained. Messina usually stopped the music if it was after 10:00 p.m. Eventually, the residents located near the facility signed a petition for the Parish to take some action to curtail the noise from the music.

The issues was considered by the Parish counsel on August 5, 1997 in a public hearing. A recommendation was made to amend the Code of Ordinances, Section 3-6, which regulates the permitting process for the sale and consumption of alcoholic beverages outdoors. At the time, the ordinance exempted restaurants from its provision. The amendment would remove the exemption and provide for a procedure to appeal to the council if a permit application was denied. Several resident near the Plaintiffs' business poke in favor of the ordinance, contending that the noise and vibrations emanating from the bands playing for the outside wedding receptions was so bad that it seriously impeded conversations and shook the houses. During the discussion, it was noted that alcohol consumption causes raised voices, causing the music in turn to be played louder. Thus, regulation of the sales and consumption of alcoholic beverages would be a way to control the noise. The Parish council members acknowledged that a specific noise ordinance was moor difficult to draft because of freedom of speech and law enforcement concerns.

Following the meeting, the Parish council passed an amended ordinance which required the Plaintiffs to apply to the Director of Planning and Zoning for a non-fee, one-time permit.[1] The Plaintiffs continued to operate the business for

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[1] After the application is received, the Director posts the notice of the application for 5 days. If no negative commentary is received, the permit may be granted. If there is negative commentary, or the Director denies the application without negative comm[illegible], the application is forwarded to the Parish

four months without applying for it, although they were warned to comply. The Plaintiffs finally submitted the application in December of 1997, after the Sheriff shut down the business for providing alcoholic beverages outdoors without a permit. The permit was denied by the Director of Planning and Zoning and was then forwarded to the Parish Council for consideration . A hearing was held on January 5, 1998, during which five residents affected by the permit spoke against granting the permit and one person spoke in favor. Two of the residents contended that the loudness of the music was directly related to the consumption of alcoholic beverages because the more people drink, the louder they speak and the louder the music is played to compensate. Messina also spoke at the council meeting, arguing that he purchased the property in 1994 for the purpose of operating a wedding reception business. Since the land outside of the restaurant is visually appealing and the building was too small to hold large receptions inside, he set about making the outside suitable for large receptions. Messina said that he purchased large tents, built a deck, and put lights in the trees. He noted that he cannot operate profitably using just the inside of the building because of its small size. He disagreed that the alcohol ordinance would solve the noise problems and was upset that the ordinance was passed without first holding a meeting with the neighbors. Messina argued that the council could not use an alcohol ordinance to deny his permit because of noise when the object of the ordinance is

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Council for consideration.

to regulate alcohol, and there was no showing that the two were related. The Parish council tabled the matter to permit Messina and the neighbors to have a town meeting to attempt to resolve this problem. According to the petition, the meeting was not held and on February 2, 1998, the Parish council denied the permit.

On appeal, the Plaintiffs contend that the trial judge erred in granting the summary judgment because there are material issues of fact in dispute and because the Defendant is not entitled to a judgment as a matter of law. The Plaintiffs further assert that they were denied their constitutional rights of due process of law and equal protection and were deprived of property without just compensation.

PROCEDURAL DUE PROCESS OF LAW

The Fifth and Fourteenth Amendment of ths U.S. Constitution and La.Const.art. 1, § 2 provide that no person shall be deprived of life, liberty or property without due process of law. "Procedural due process imposes constraints on governmental decisions which deprive individuals of property interests within the meaning of the Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Martin v. Rush's Fabricare Center, Inc., 590 So.2d 707, 709 (La.App. 3d Cir. 1991). Thus, in any due process claim involving the loss of property, the claimant must show the existence of a property interest that has been adversely affected by the state action. Martin, 590 So.2d at 709. Further, affected persons have the right to be heard and in order that they may enjoy that right, they must first be notified. Jackson Court Condominiums, Inc. v. New Orleans, 874 F.2d 1070 (5th Cir. 1989); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). However, when a governmental action is characterized as legislative, procedural due process requirements do not apply. Jackson, 874 F.2d at 1074. Zoning decisions by city councils are characterized as legislative or quasi-legislative, thereby negating procedural due process claims. Id.; South Gwinnett v. Pruitt, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974).

In this case, the Plaintiffs argue that they were denied procedural due process because the ordinance was amended without notice to them . However, the Plaintiffs

have no claim for procedural due process since the Parish council is a quasi-legislative body. Even so, the ordinance was discussed in a public hearing in which any interested party could participate, Messina knew about the ordinance after it was passed, yet waited four months to apply for the permit, and he participated in the discussion at the council meeting held in January of 1998 to determine whether he would receive a permit.

SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

The Plaintiffs argue that the Parish council's act of passing the ordinance and subsequently denying a permit to Messina's affected and vested right and forced the closure of this business. He explains that the building only holds 75 people and it would have been unprofitable to operate a wedding reception/party business in such a small area. He further stated that no one would book the facility without outdoor access to alcoholic beverages. The Plaintiffs also contend that the Parish council passed the ordinance solely to affect Messina's and there was no showing that any other restaurant would be affected, and that it was passed as a unconstitutional pretext to regulate noise.

Substantive due process rights are balanced against the police power of a governing authority to protect the health, safety, morals and general welfare of the people. State v. Edwards, 00-1246, 14, (La. 6/1/01), 787 So.2d 981, 992. Governments have an inherent need "to protect the safety and welfare of their citizens from the unrestrained

liberty of some individuals." Nowak, Constitutional Law 389 (1978), citing Corwin, Liberty Against Government 72 (1948); Edwards, 00-1246 at 15, 787 So.2d at 992.

In med. Exp. Ambulance Services, Inc., v. Evangeline Parish Police Jury, 96-0543, p. 7-8 (La. 11/25/96), 684 So.2d 359, 365, the Court analyzed the equal protection and due process provisions of the federal and state constitutions in the context of a local ordinance. The Court stated:

> Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in areas of social and economic policy, a statutory classification which does not proceed along suspect (FN10) or semi-suspect lines, (FN11) nor infringe on fundamental rights, (FN12) need only be rationally related to a legitimate governmental interest. City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). Similarly, the crux of the Due Process Clause of the Fourteenth Amendment, is protection from arbitrary and unreasonable action and when the ordinance or statute does not affect fundamental rights, but rather is merely economic or social regulation, it need only have a rational

relationship to a legitimate governmental interest. Id.[2]

The Court distinguished between the federal constitution and the rights guaranteed under the Louisiana State constitution, stating that "The rights guaranteed under our state constitution are not always synonymous with federal constitutional rights," citing Crier v. Whitecloud, 496 So.2d 305 (La. 1986) and Sibley v. Bd. of Supervisors of Louisiana State University, 477 So.2d 305 1094 (La. 1985). In Sibley, the Louisiana Supreme Court rejected the three-tiered federal system standard of equal protection review for interpreting and applying the equal protection

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[2] Laws drawing lines along suspect classifications are subject to strict scrutiny and must be necessary to achieve a compelling state interest." Med Exp. Ambulance Services, Inc., 684 So.2d 365 at FN 10. "Laws drawing lines along semi-suspect classifications are subject to intermediate scrutiny and must substantially further an important state interest." Id. at FN 11. "Like laws drawn along suspect lines, laws impinging on fundamental rights are subject to strict scrutiny." Id. at FN 12.

clause of our state constitution found in Article I, §3.[3] The Court shifted the focus from determining under which category a particular case falls (strict, intermediate, or minimum scrutiny), which then all but decided the case, to that of conducting an independent review of the specific merits of the individual case which necessarily entails a balancing or comparative evaluation of governmental and individual interests. Sibley, 477 So.2d at 1107; PANO v. City of New Orleans, 94-1078, p. 16 (La. 1/17/95), 649 So.2d 951, 963. The Court stated that La.Const. Art. I, § 3,

> "commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be

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[3] Article I, § 3 provides in pertinent part:

> No person shall be denied the equal protection of laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition or political ideas or affiliations....

> refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

Sibley, 477 So.2d at 1107-08.

"Under the third level of scrutiny, the law creating the classifications is presumed constitutional and the party challenging the constitutionality of the law has the burden of proving it unconstitutional."[4] Med Exp. Ambulance Service, Inc., 96-0543 at 10, 684 So.2d at 367.

In this case, the ordinance is not based on any classification enumerated in Article I, § 3, nor does it involved a suspect or semi-suspect class. Thus, the ordinance must be upheld unless the Plaintiff can show that it does not further an appropriate governmental interest under the state constitution, or that is not rationally related to a legitimate governmental interest, as required by the federal constitution. The Plaintiffs have produced no evidence to meet this burden, so the ordinance is presumed constitutional. The health, safety, and welfare of citizens

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[4] Manuel v. Louisiana, 95-2189, p. 5 (La. 7/2/96), 677 So.2d 116, 120.

are appropriate government interests, and alcohol regulation are directly related to the health, safety and welfare of the citizens.

The Parish council has the authority under law to enact ordinances to curtail noise or the unruly behavior associated with alcohol consumption in a specific location. See: West Central Louisiana Entertainment, Inc. v. City of Leesville, 594 So.2d 973 (La. App. 3d Cir. 1992); Callaghan v. Congemi, 1995 WL 354844 (E.D.La. 1995). Municipal or parochial regulation of intoxicating beverages may be more stringent or restrictive than state law regulations if "appropriate to the necessities of the locality and that it is not in itself unreasonable." City of Lafayette v. Elias, 232 La. 700, 95 So.2d 281, 284 (1957). Vonderhaar v. Parish of St. Tammany, 633 So.2d 217, 221 (La.App. 1st Cir. 1993). If a rational basis can be found for the ordinance, the motive behind its passage is not subject to review as to whether the purpose of the statute can actually be fulfilled. FCC v. Beach Communications, Inc., 124 L.Ed.2d 211, 508 U.S. 307, 113 S.Ct. 2096, 2102 (1993), on remand, 1993 U.S. App. LEXIS 34955 (D.C. Cir. Oct. 22 1993).

In this case, the Plaintiff has no fundamental right to serve alcoholic beverages. Although the denial of the permit affects the scope of his business, the ordinance does not affect his right to conduct either a restaurant business or a reception business. His right to provide alcoholic beverages inside was not revoked by the ordinance. The ordinance is merely economic or social regulation. Thus, it need only have a rational relationship to a legitimate

governmental interest. Here, the restriction on alcohol outdoors has a rational relationship to a legitimate governmental interest, which is to regulate noise nuisance. Based on comments made in the Parish council meetings, the Parish council concluded that removing the exemption for restaurants was the best way to regulate the noise caused by loud music at outside parties. We find that this is not an unreasonable approach to the problem. Since the ordinance does not affect a fundamental right, does not constitute arbitrary and unreasonable action, and is rationally related to a legitimate government interest, it does not violate the federal or the state's due process protections.[5] For the same reasons, we find that denial of the permit was no an unlawful taking without just compensation.

SUMMARY JUDGMENT

A summary judgment is reviewed by the appellate courts de novo, using the same criteria applied by the trial courts to determine whether summary judgment is appropriate. Smith v. Our Lady of the Lake Hosp., 93-2513, p. 26 (La. 7/5/94), 639 So.2d 730, 750; Garrison v. Tanenbaum, 02-1181, p. 4 (La.App. 5th Cir. 4/8/03), 846 So.2d 40, 42.

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[5] We note that the property in question was initially built as a law office and later opened as a bar and restaurant. The houses surrounding the building were in existence before the building was built. The Plaintiffs furthermore did not have a vested right to an outdoor alcohol permit.

The burden of proof is on the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the trial court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the trial court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Garrison, 02-1181 at 5, 846 So.2d at 43. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. Id.; La. C.C.P. art. 966(C)(2). After the motion for summary judgment has been properly supported by the moving party, the failure of the adverse party to produce evidence of a material factual dispute mandates the granting of the motion. Garrison, 02-1181 at 5, 846 So.2d at 43.

We find that summary judgment was properly granted by the trial judge. We have determined that the trial judge did not err in finding that the Defendant did not violate any constitutional rights of the Plaintiffs. Thus, there are no material issues of disputed fact left to be resolved that would affect the outcome of the case and the Parish is entitled to a judgment as a matter of law.

Accordingly, the judgment of the trial court is hereby affirmed. Costs of the appeal are to be paid by the Plaintiffs.

AFFIRMED

The Supreme Court of the State of Louisiana

ANDREW MESSINA, JR.

VS. NO. 2004-C-0285

ST. CHARLES PARISH COUNCIL

IN RE: Messina, Andrew, Jr.; D&G Productions, Inc.; Plaintiff(s); Applying for Writ of Certiorari and/or Review, Parish of St. Charles, 29th Judicial District Court Div. D, Nos. 50,029; to the Court of Appeal, Fifth Circuit, No. 03-CA-644

March 26, 2004
Denied.

CDT
PFC
CDK
BJJ
JPV
JTK
JLW

Supreme Court of Louisiana
March 26, 2004

s/Katherine A. Fontana
Deputy Clerk of Court
For the Court